STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE CITY OF PLYMOUTH,

Plaintiff-Appellee,

v

DARRELL KANKA,

Defendant-Appellant.

UNPUBLISHED
December 5, 2006

No. 260966
Wayne Circuit Court
LC No. 04-500029

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant appeals by leave granted the circuit court's order affirming his district court jury conviction of operating a motor vehicle while under the influence of alcohol in violation of the City of Plymouth Ordinance 5.15A. We affirm.

Prior to trial commencing in this matter, defendant filed motions to dismiss the charge and to suppress the evidence and EBT results premised on several grounds, including that he did not consent to the EBT and that his request for a blood test was wrongfully denied. At the evidentiary hearing, defendant sought assurance from the trial court that his testimony in support of these alleged Fourth Amendment violations could not be used against him on the issue of guilt if he chose not to testify at trial. The trial court, effectively, denied the request, holding that if defendant testified, the prosecutor may be permitted to use defendant's evidentiary hearing testimony against him.

On appeal, defendant first argues that as a result of the trial court's ruling, he was forced to choose between pursuing his Fourth Amendment claims or asserting his Fifth Amendment privilege against self-incrimination. We agree.

The Fourth and Fifth Amendments of the United States Constitution were made applicable to the states through the Fourteenth Amendment. See *People v Manning*, 243 Mich App 615, 627; 624 NW2d 746 (2000). The Fourth Amendment prohibits unreasonable searches and seizures of persons and property and the Fifth Amendment prohibits involuntary self-incrimination. See US Const, Am IV; US Const, Am V.

As defendant argued, this issue was decided long ago in *People v Wiejecha*, 14 Mich App 486; 165 NW2d 642 (1968). In that case, the defendant moved to suppress evidence claiming an illegal search and seizure. *Id*. at 487. In challenging the admissibility of the disputed evidence,

defense counsel "requested that defendant be allowed to take the stand for the limited purpose of testifying concerning the facts surrounding his arrest." *Id*. The request was denied, and the decision was appealed. This Court concluded as follows:

> The defendant had a right to have an evidentiary hearing on his motion. The defendant has this right in every case, jury or nonjury, if such a hearing is requested. Upon such a hearing, the defendant has the right to take the stand on the understanding that his doing so is not a general waiver to his right not to take the stand at all.
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> We hold further that by so doing, defendant does not waive his right to decline to take the stand and testify if a retrial for any reason is ordered. Neither does he waive any of the other rights stemming from his choice not to testify. [*Id*. at 489.]

In reaching its holding, the *Wiejecha* Court relied on the federal case of *Simmons v United States*, 390 US 377; 88 S Ct 967; 19 L Ed 2d 1247 (1968), which held that "the testimony of a defendant in support of a motion to suppress evidence on Fourth Amendment grounds may not thereafter be admitted against him at trial on the issue of guilt." *Wiejecha*, *supra* at 488, citing *Simmons*, *supra* at 394. The rational for the decision was that a defendant should not have to choose between "asserting his Fourth Amendment claim or exercising his Fifth Amendment privilege against self-incrimination." *Wiejecha, supra*.

The situation presented in the case of a defendant contesting a search and seizure is analogous to that presented by a defendant challenging the voluntariness of his confession. With regard to the evidentiary hearing that follows such a challenge, our Supreme Court in the seminal case of *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965), held:

> At this hearing, we hold the defendant may take the stand and testify for the limited purpose of making of record his version of the facts and circumstances under which the confession was obtained. We hold further that by so doing defendant does not waive his right to decline to take the stand on trial in chief, if retrial is ordered. Neither does he waive any of the other rights stemming from his choice not to testify. [*Id*. at 338.]

In *People v Bynum*, 21 Mich App 596; 175 NW2d 870 (1970), this Court affirmed a trial court's ruling that, consistent with *Walker*, *supra*, if the defendant testified at the evidentiary hearing but did not testify at trial, the defendant's evidentiary hearing testimony could not be used against him on the issue of guilt. *Brynum*, *supra* at 600-601.

We reject plaintiff's argument on appeal that the rights protected by the *Simmons* ruling were not impacted in this case because defendant did not testify at the evidentiary hearing. Defendant was given the choice of either asserting his Fourth Amendment claims or exercising his Fifth Amendment privilege against self-incrimination—the precise situation that our United States Supreme Court in *Simmons* found "intolerable." *Simmons*, *supra* at 394. Although defendant eventually decided to testify at trial—likely because if he did not testify his claims would not have been considered—he still was entitled to, and was denied, the right to choose to

testify at the evidentiary hearing without risking his Fifth Amendment privilege.

Therefore, the trial court erred when it denied defendant's request to testify at the evidentiary hearing for the limited purpose of making a record of his allegations. Defendant should have been permitted to testify with the assurance that his testimony could not be used against him at trial on the issue of guilt if he did not testify at trial. But, defendant should have been advised that if he did testify at trial, the evidentiary hearing testimony could be used against him for impeachment purposes. See *Bynum, supra*. However, the issue remains whether relief is warranted. Defendant does not explain on appeal the rationale in support of his claim that reversal is warranted. We conclude that relief is not warranted in this case because the error was harmless, whether considered an evidentiary error or a constitutional error. See *People v Whittaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001); *People v Solomon (Amended Opinion)*, 220 Mich App 527, 535-536; 560 NW2d 651 (1996).

Defendant did not testify at the evidentiary hearing; therefore, no such testimony was used against him at trial and his Fifth Amendment right was not actually violated. With regard to his Fourth Amendment claims, if defendant had testified at the evidentiary hearing his testimony would have been consistent with the claims asserted in his motion, as well as his trial testimony, which included that (1) he agreed to take the breath test because he "was under a lot of pressure to do so," and (2) his repeated requests for a blood test were wrongfully ignored or denied. Neither of these claims are meritorious.

First, the pressure to which defendant refers is the "threat" that if he refused to take the EBT, Officer Chumney would seek a court order for the test. But, defendant's chemical rights were read to him before the EBT was administered and the rights included that a court order could be secured that would require defendant to submit to a chemical test as permitted by MCL 257.625a(6)(b)(iv).[1] Thus, Officer Chumney advising defendant that he would, in fact, secure the necessary court order if defendant refused the test is not tantamount to a "threat." Thus, defendant's consent to the EBT was not involuntary.

Second, whether defendant's requests for a blood test were ignored or denied constitutes a disputed issue of fact. Officer Chumney testified that he did not recall defendant requesting a blood test. Defendant claimed he repeatedly requested a blood test. This issue of fact rests on a credibility determination—as the trial court noted when denying defendant's motion for directed verdict at the close of the trial proofs. We recognize that at a suppression hearing the trial court is the finder of fact.[2] But, in light of the lack of evidence in support of defendant's claim, as well as the trial court's denial of defendant's motion for directed verdict, we conclude that it is highly improbable that the trial court would have resolved this factual dispute in defendant's favor at the evidentiary hearing even if defendant had testified.

Further, even if Officer Chumney had failed to give defendant a reasonable opportunity

[1]MCL 257a(6)(b)(iv) states that "If he or she refuses the request of a peace officer to take a test described in subparagraph (i), a test shall not be given without a court order, but the peace officer may seek to obtain a court order.

[2] See, e.g., *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999), quoting *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983).

for an independent chemical test, our Supreme Court recently held in *People v Anstey*, 476 Mich 436; 719 NW2d 579, 583, 595 (2006), that such failure does not result in a constitutional due process violation. Specifically, the Court held that "the police have no constitutional duty to assist defendant in developing potentially exculpatory evidence." *Id*. at 595. Thus, neither dismissal nor suppression of the evidence is the appropriate remedy for this statutory violation. *Id*. at 587.

In sum, although defendant should have been permitted to testify at the evidentiary hearing regarding his purported Fourth Amendment claims, this error does not warrant relief because, even under the strictest standard of review, it was harmless.

Next, defendant argues that the traffic stop was not supported by reasonable suspicion, thus, his motion to suppress the resulting evidence should have been granted. We disagree. The factual findings at a suppression hearing are reviewed for clear error and the ultimate ruling is considered de novo. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002).

To effectuate a traffic stop that does not offend the Fourth Amendment, a police officer must have "a particularized suspicion, based on an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing." *People v Peebles*, 216 Mich App 661, 664-665; 550 NW2d 589 (1996), quoting *People v Shabaz*, 424 Mich 42, 59; 378 NW2d 451 (1985). The totality of the circumstances are to be considered to assess the police officer's suspicion that criminal activity is afoot. *Id*.

Here, Officer Chumney testified at the evidentiary hearing that he stopped defendant after he saw defendant completely stop for a green light, wait until the light turned red, then make a right turn without signaling, and rapidly accelerate while pumping his brakes. Several traffic violations occurred in this scenario but an actual violation need not be proved; the officer need only have reasonable suspicion that a violation may have occurred. *People v Fisher*, 463 Mich 881, 882; 617 NW2d 37 (2000) (Corrigan, J., concurring). At the very least, Officer Chumney had a reasonable suspicion that defendant violated MCL 257.611, which requires obedience to traffic control devices, as well as MCL 257.648(1), whereby a driver is required to signal before turning; both violations are civil infractions. MCL 257.611(3); 257.648(4). Therefore, the traffic stop was lawful and defendant's motion to suppress on this ground was properly denied.

Next, defendant argues that his arrest was not supported by probable cause, thus, his motion to suppress the resulting evidence should have been granted. Again, we disagree.

To effect an arrest of a suspect without a warrant that does not violate the Fourth Amendment, the police officer must have probable cause to believe that an offense has occurred and that defendant committed it. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Id*.

In this case, Officer Chumney testified at the evidentiary hearing that after he stopped and spoke with defendant, he detected the odor of intoxicants about his person. He also observed that defendant's eyes were bloodshot and glassy, and his speech was occasionally slurred. Defendant indicated that he had been at the Lower Town Grill consuming beer. Officer

Chumney then asked defendant to step out of his vehicle and take three field sobriety tests, two of which he failed. Defendant then agreed to take the PBT, after which defendant was arrested for operating under the influence of alcohol. Officer Chumney testified that he would have arrested defendant even without the PBT, the results of which were suppressed by the trial court. In light of these circumstances, "a man of reasonable caution" would conclude that defendant was driving under the influence of alcohol. See *id*. Therefore, defendant's motion to suppress premised on this ground was properly denied.

Next, defendant argues that the Datamaster results were unreliable because the police agency substantially failed to comply with the administrative rules for breath alcohol testing, including 1994 AACS R 325.2653-2655, thus, his motion to suppress the resulting evidence should have been granted. We disagree.

Generally, under the implied consent statute, MCL 257.625a(6)(a), chemical test results are admissible into evidence. The department of state police is charged with promulgating rules for the administration of such chemical tests. MCL 257.625a(6)(g). The purpose of administrative rules with regard to the administration of breath tests is to ensure the accuracy of the test results. *People v Wujkowski*, 230 Mich App 181, 187; 583 NW2d 257 (1998). Only relevant and reliable chemical test results are admissible. *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999); *People v Campbell*, 236 Mich App 490, 502, 504; 601 NW2d 114 (1999). Accordingly, technical violations of the administrative rules do not require suppression of breath test evidence if there is nothing to indicate that the tests results were inaccurate. *People v Rexford*, 228 Mich App 371, 378; 579 NW2d 111 (1998).

Several of these administrative rules relate to the maintenance and testing of the test instrument. See 1994 AACS R 325.2653-2655. More specifically, the test instrument is to be tested for accuracy at least once a week, R 325.2653(1), using only certified ampoules of a certain alcohol solution, R 325.2655(1)(d), and records of verification are to be maintained, R 325.2654(2). In this case, defendant claimed that these rules were violated. In support of his argument, he claimed that the accuracy of the test instrument that was used to test him had not been verified for 11 of the 33 weeks preceding his test, and no verification had been performed in the weeks of February 13 to 19, 2000, or February 27 to March 4, 2000. Defendant also argued that the correct records were not kept of the testing actually performed; the tickets that are printed from the instrument during the testing were not produced, the supervisor did not sign the testing logs, and no records verifying that the machine was tested with the proper alcohol solution were produced.

Despite these uncontested allegations, defendant offered no evidence that the instrument used to test his breath was inaccurate. Suppression of test results is only required when a violation of the administration rules calls into question the accuracy of the test. *Campbell*, *supra* at 507. Here, the instrument was tested on the same day as defendant was tested, March 5, 2000, 21 hours later, and proved accurate. The instrument was tested nine days before defendant's tests, as well as for several months before and after defendant's tests—including six times in February and four times in March of 2000—and the results were always within acceptable limits.

Defendant's reliance on the inapposite cases of *People v Boughner*, 209 Mich App 397; 531 NW2d 746 (1995) and *People v Willis*, 180 Mich App 31, 34-35; 446 NW2d 562 (1989)[3] is misplaced. In those cases, the challenges to the accuracy of the test results were not premised on the maintenance or testing of the instrument; rather, the challenges were to the actual administration of the tests. In fact, the circumstances presented in this case are more similar to the situation presented in *Rexford*, *supra*. In that case, the defendant challenged the accuracy of the test results on the ground that the Breathalyzer instrument had not been tested for accuracy during one week, the month prior to his test. *Id*. at 373. This Court rejected the notion that a violation of the administrative rules required automatic suppression, and instead held that when there is nothing to indicate that the test results were in any way inaccurate, the error is harmless. *Id*. at 378.

In summary, although it is undisputed that some of the administrative rules related to the maintenance and testing of the breath testing equipment were violated, defendant did not establish that the results were unreliable, i.e., sufficiently questionable, so as to preclude their admission into evidence. Accordingly, his motion to suppress on this ground was properly denied.

Next, defendant argues that he was denied his right to a reasonable opportunity for an independent chemical test, thus, his motion for directed verdict should have been granted. Considering the evidence presented by the prosecutor in a light most favorable to the prosecution, we disagree. See *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). As discussed above, Officer Chumney testified that he did not recall defendant requesting a blood test and defendant testified that he repeatedly requested the blood test; thus, it was a disputed issue of fact for the jury, not the trial court, to decide. See *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). In any event, even if defendant was denied this opportunity as he claims, neither dismissal nor suppression was the remedy. See *Anstey*, *supra*.

Next, defendant argues that he did not voluntarily submit to the EBT, thus, his motion to suppress the resulting evidence should have been granted. We disagree. As discussed above, defendant was read his chemical rights, which included that if he refused a request for a chemical test of his breath, blood or urine, the officer may seek a court order. See MCL 257.625a(6)(b)(iv). Defendant claims that he only agreed to the EBT because Officer Chumney advised him that he would get a court order for one. Suppression is not warranted under these circumstances.

Defendant also argues that he was denied the effective assistance of counsel primarily because his attorney failed to present additional evidence. After extensive review of the record, we disagree. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To prove an ineffective assistance of counsel claim, a defendant must establish that his counsel's performance fell below an objective standard of reasonableness and that, but for his errors, there is a reasonable probability that the outcome of the proceedings would have been different. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). The

[3] Overruled on other grounds by *Anstey*, *supra* at 586 n 9.

defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy. *People v Pickens*, 446 Mich 298, 312, 314; 521 NW2d 797 (1994).

Defendant primarily claims that his attorney should have presented additional evidence. Decisions regarding what evidence to present are presumed to be matters of trial strategy and the failure to present additional evidence only constitutes ineffective assistance of counsel when it deprives the defendant of a substantial defense that would have affected the outcome of the proceedings. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). In this case, defendant has failed to overcome the presumption that he received the effective assistance of counsel.

In brief, first, defendant's claim that evidence of his "bad hip" should have been presented to explain why he failed the field sobriety tests is meritless. Such evidence would not negate all of the other indicia of intoxication. Second, whether defendant had periodontal disease and acid reflux and, if so, the impact on the EBT as a consequence is purely speculative. See *People v Hoag*, 460 Mich 1, 8; 594 NW2d 57 (1999). Third, what the witness to defendant's alleged request for a blood test would have testified to is also pure speculation. See *id*. Fourth, defendant has failed to indicate what records related to the EBT equipment were missing so this claim is deemed abandoned. See *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Fifth, defendant's claim that his attorney should have challenged the Datamaster results even more extensively is speculative and fails. See *Hoag*, *supra*. And, defendant's claims that his attorney should have moved to dismiss the case after the PBT results were held inadmissible and that the state failed to advise defendant "of how much alcohol can be consumed before defendant is over the legal limit" were not properly argued on appeal and cannot thoughtfully be discerned. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Finally, defendant's claim that the cumulative effect of individual errors denied him a fair trial is without merit because there were no such errors. See *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens